BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA D. CRITES	)	
Claimant	)	
	)	
VS.	)	
	)	
ATTICA LONG TERM CARE FACILITY	)	
Respondent	)	Docket No. 1,015,285
	)	
AND	)	
	)	
DIAMOND INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 2, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment on April 23, 2003, through August 26, 2003.

The respondent requests review of the following: (1) whether the claimant's accidental injury arose out of and in the course of employment on August 26, 2003; and, (2) whether the claimant's current need for medical treatment is related to work or an intervening accident.

Conversely, the claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has alleged a series of injuries during the course of her employment beginning on December 20, 2000, and each and every day through August 26, 2003. Claimant also described specific acute injuries which occurred on December 20, 2000, April 23, 2003, and August 26, 2003.

Respondent argued the claim for injury on December 20, 2000, was time barred, respondent admitted the accidental injury on April 23, 2003, and denied the alleged accident on August 26, 2003, as well as the series of accidents alleged each and every working day.

Claimant has worked for respondent's nursing home facility for approximately six years. She was required to lift and transfer patients in and out of bed as well as assist feeding, bathing and clothing the residents. On December 20, 2000, claimant heard her back pop when she was transferring an individual with one leg from the bed to a wheelchair. Claimant reported the injury to the administrator, Judy Bane.

Claimant sought treatment with Dr. Ralph E. Bellar's office and was treated by Richard Aldis, physician's assistant, for over a year. Claimant received some pain medication as well as physical therapy. Dr. Bellar's office placed a 25-pound weight restriction on the claimant. Claimant was referred to both Drs. Robert L. Eyster and George G. Fluter by Mr. Aldis.

Claimant saw Dr. Eyster in February 2001 and restrictions were placed upon the claimant of no lifting over 25 pounds, no repetitive lifting over 10 pounds and no excessive twisting or bending as well as no prolonged sitting. Claimant continued to work with these restrictions.

Dr. Fluter treated the claimant from April 2001 through November 6, 2001. Dr. Fluter ordered physical therapy, a back brace and stretching exercises. The doctor placed the claimant on light duty and claimant worked under these restrictions until she was terminated on September 3, 2003, due to a layoff. Claimant worked from her initial injury on December 20, 2000, through April 23, 2003.

Claimant also sustained an injury to her low back on April 23, 2003, while keeping a patient from falling to the ground. The patient was transferring from a car to a walker. The same day, claimant notified Judy Bane about the incident and completed an Employee's Incident Report.

Claimant treated with Mr. Aldis from April 23, 2003, through June 26, 2003. On August 26, 2003, claimant was transferring a patient from a wheelchair to a dining room chair. The patient stumbled and claimant kept the patient from falling. Claimant noticed pain in her low back, buttocks and leg. Claimant completed another incident report and placed it on Judy Bane's desk. Claimant testified that she asked Judy Bane if she could see Mr. Aldis for treatment of her back pain. Claimant was advised by Mr. Aldis to continue

the Tylenol and Ibuprofen and that there was nothing else he could do until he received the incident report.

Claimant was laid off on September 3, 2003. Claimant did not seek medical treatment between her layoff and January 2004 because she did not have any medical insurance. During this time frame, claimant continued to take Tylenol and Ibuprofen for pain. She continued to perform the stretching exercises. On approximately January 6, 2004, claimant again contacted Mr. Aldis with back complaints which she attributed to vacuuming at home.

The claimant's uncontradicted testimony establishes she suffered an additional acute injury to her lower back on August 26, 2003, and not only reported the incident to her supervisor but also requested medical treatment. That treatment was not provided and claimant was laid off. Claimant has met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment with respondent.

Respondent argues that claimant's current need for medical treatment was caused by an intervening non-occupational incident when she had an onset of back pain while vacuuming at her home.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[1] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[2] Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

In general, however, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent activity aggravated, accelerated or intensified the underlying disease or affliction.[3]

After the August 26, 2003, work-related incident, the claimant stated that she had pain in the lower back going down into her buttocks and leg. She noted this pain was the same as she experienced after each acute episode at work. And claimant noted that after August 26, 2003, she was never pain free. Claimant further stated that her back pain after

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[1] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[2] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[3] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied 265* Kan. 884 (1998).

the incident vacuuming at home was basically the same. A comparison of the MRI on January 17, 2004, with the MRI on January 9, 2001, reveals that claimant's significant problem remains bulging disks at L4-5 and L5-S1.

The Board concludes that claimant's testimony regarding her ongoing back pain, corroborated by the medical testing, indicates that her condition has not been aggravated, accelerated or intensified to such an extent that she can be said to have suffered an intervening accident while vacuuming at home. Consequently, the ALJ's Order is affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[4]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated March 2, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

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BOARD MEMBER

c: E.L. Lee Kinch, Attorney for Claimant
Edward D. Heath Jr., Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[4] K.S.A. 44-534a(a)(2).